ALSTON + BIRD LLP

Energy ADVISORY

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FERC Explores Participant-Funded Transmission Project Issues, Requests Comments

On March 15, 2011, the Federal Energy Regulatory Commission (FERC) hosted a technical conference addressing issues related to the ownership of and priority access rights to new participant-funded transmission projects, both independent/merchant transmission lines and generator lead lines. A summary of the conference is set forth below. Subsequent to the conference, FERC issued a notice soliciting written comments on these issues, which are due no later than April 21, 2011.

In the agenda and opening remarks at the technical conference, FERC acknowledged the electric industry has evolved since the adoption of Order No. 888 and the implementation of open access to transmission: transmission infrastructure is no longer solely developed, owned and operated by traditional utilities serving native load within their footprint. FERC's objective was to use the technical conference to explore issues related to priority rights to use transmission developed under new business models in two contexts: (1) independent and/or merchant transmission and (2) generator lead lines. For both issues, FERC encouraged participants to address the appropriate balance between the open access requirement and the needs of project developers. FERC has also asked for input on specific regulatory alternatives that are consistent with FERC's open access policies and its statutory responsibility to ensure that rates, terms and conditions of service are just and reasonable and not unduly discriminatory or preferential.

The conference was organized into two panel discussion sessions, one addressing independent/merchant transmission line issues, and the other addressing generator lead line issues.

Issues Relating to Independent and/or Merchant Transmission Lines

The purpose of this panel was to discuss whether and to what degree to allow non-traditional transmission developers flexibility in the allocation of priority rights to use transmission facilities. FERC encouraged the panelists to address the impact of FERC's affiliate rules and pricing structures on project economics and the need for and appropriate application of mechanisms to ensure customer interest in and access to new transmission. Nine panelists offered comments on these issues. The following are highlights of those comments:

- One panelist, representing an independent transmission development company, suggested the concept of a "merchant generator lead line," where multiple generators use one radial line to get to the integrated transmission system and structured such that an anchor customer, using as high as 75 percent of the line's capacity, can finance the initial construction of the radial line. An open season would then be held for the remaining capacity.

- At least one other panelist, also representing independent transmission developers, expressed support for allowing anchor tenants to reserve high percentages of capacity. FERC has allowed anchor tenants to reserve up to 50 percent of a merchant project's capacity in the past. In other circumstances, FERC has also allowed 100 percent of the capacity of a high-voltage direct current (HVDC) line to be reserved by a customer. Another representative of an independent transmission developer suggested that FERC should not fix rigid parameters for the application of anchor tenant participation. Some of the special rights proposed for anchor tenants included favorable rate treatment, greater control over the determination of transmission service rights, contract terms and influence over the nature, timing and cost of the project development itself.

- A developer of wind generation facilities suggested that limited but meaningful priority rights for right-sized transmission lines are necessary to incentivize generators and indicated support for priority rights for first movers over customers who have taken on less risk. A representative of an independent transmission developer also supported the concept that latecomers should not have the absolute right to obtain terms and conditions equivalent to those negotiated with first movers or anchor tenants, stating that if latecomers are afforded these same rights, there will be no early movers.

- A panelist representing a utility expressed concern regarding regulatory uncertainty and urged FERC to clarify and confirm a transmission provider's ability to assign priority access rights for future network load service obligations and to permit appropriate mechanisms for reducing cost recovery risk for all transmission expansion projects, both at the federal and state levels.

- Another panelist urged FERC to maximize open access at non-pancaked rates—to make as much available capacity as possible, as early as possible, under a utility's generally-applicable open access transmission tariff (OATT), rather than a separate, stand-alone transmission tariff specific to new merchant facilities. The panelist contended that the participant-funded merchant model raises the societal cost of transmission due to the potential for missed opportunities for multi-purpose projects and network synergies, the creation of new rate pancakes, and the potential for negotiated transmission rates far in excess of costs.

- Several panelists asserted that one way to encourage collaboration between merchant transmission and incumbent utilities is to have merchant transmission projects participate in the planning process. Another panelist disagreed and maintained that participant-funded projects should not be subjected to the planning process because the principal reason for the planning process is to determine whether transmission lines are needed and are justified. The panelist suggested that such lines are paid for by captive customers, whereas participant-funded projects are paid for by the market and therefore should only be included in the planning process to the extent necessary to determine that they can be interconnected reliably.

- Another recommendation was to encourage traditional incumbent transmission providers to partner with independent developers in building new long-distance transmission lines. There was some disagreement by members of the panel as to whether such partnerships are feasible. One independent transmission developer representative suggested that FERC should consider the fact that incumbents would like to invest in merchant projects, take capacity and be able to market the capacity without it going into their OATT and being subject to the same cap on returns and rates. The developer opined that this does not present an attractive investment scenario for incumbent utilities.

Questions related to independent/merchant transmission posed at the technical conference by the FERC Commissioners and FERC Staff included the following:

- FERC Chairman Wellinghoff asked for specific recommendations regarding ways to encourage collaboration between incumbent utilities and merchant transmission developers.

- FERC Staff asked whether open seasons are effective at "right-sizing" a project—i.e., ensuring that a new transmission project is built at the size most beneficial to customers. If so, why? If not, are there other methods or mechanisms that should be used to right-size projects?

- FERC Staff noted that FERC has provided some guidance regarding independent developers that are providing service at cost-based rates. Staff inquired whether, and why, this guidance has been insufficient.

Issues Relating to Generator Lead Lines

More and more often, generation owners have decided to build, administer and operate the transmission facilities—known as generator lead lines—needed to interconnect their generation facilities with the network transmission system. FERC requested the panel of seven speakers at the technical conference to address the application of FERC's open access policies to generator lead lines where affiliated or unaffiliated third-party generators also seek to use those facilities. Specifically, FERC asked the panelists to address the unique attributes of generator lead lines, whether FERC should apply its open access policies to generator lead lines in a manner different from other transmission facilities, and the showing needed to justify priority usage allocations on generator lead lines. Perspectives from several panelists are set forth below:

- One panelist suggested that FERC could adopt an approach whereby developers provide public notice of their intent to develop a generation lead line and hold an open season. The developer would be entitled to reserve as much capacity as it desires for its own use, but would offer to expand the line to satisfy open-season proposals, with a "good faith" obligation to attempt to construct a line that would serve all who sign up.

- A developer of generator lead lines contended that transmission priority rights for generator lead line affiliates should be based on reasonably forecasted growth. The panelist maintained that FERC should adopt a presumption granting transmission priority rights in favor of the entity constructing the generator lead line for an initial period, thus eliminating the need to file a request for declaratory order to obtain priority rights.

- At least one panelist urged FERC to disclaim its jurisdiction over generator lead lines.
- A representative of a developer urged FERC to revise its policy to allow a generation lead line owner to designate the use of average or incremental losses for all new interconnected generation under an OATT—whether by a third party or an affiliate—at the time of a third party request.
- The panelists also discussed with FERC Staff the operational and financial difficulties imposed by constructing generator lead lines. A project developer maintained that the primary difference between generator lead lines and transmission lines is that all of the money involved with generator lead lines is at risk. There are no ratepayers to guarantee cost recovery.
- A developer of generator lead lines urged FERC to reconsider its requirement that a *pro forma* OATT be filed when a third party requests access to a generator lead line, and suggested that FERC should start with a blank slate and adopt a slimmed down OATT, specific to generator lead lines, which would account for the limited services that are available. The developer noted that a generator lead line cannot provide network service or most ancillary services. The developer suggested that the Sagebrush OATT filing provides important lessons. Sagebrush received only one letter requesting service and was required by FERC's regulations to file an OATT, even though the request for service did not result in an interconnection. As other developers noted, filing OATTs for generator lead lines can impose significant burdens on project developers who may have limited staff and resources, and this process can also create regulatory uncertainty for interconnection customers. The developer asserted that FERC's implementing regulations should be sufficiently robust to limit the need for meaningless filings.

Questions posed at the technical conference by the FERC Commissioners and FERC Staff on this topic included the following:

- FERC Staff encouraged commenters to include as much detail as possible regarding suggestions for the adoption of an "OATT-lite"—i.e., a very limited form of open access transmission tariff—for capacity available on generator lead lines.
- FERC Staff presented a scenario where an independent power producer has been required by FERC policy to have an OATT on file because someone has requested service on a generator lead line, and asked what the implications of this are for the developer on its exempt wholesale generator status, its responsibilities to NERC and its financing arrangements.

On March 18, 2011, three days after the close of the conference, FERC issued a notice soliciting written comments on these issues from any interested parties. Such comments must be submitted to FERC by no later than April 21, 2011.

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